



Federal Communications Commission
Washington, D.C. 20554

DA 07-3333
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Re: Northwest Television, Inc.
Application for Construction Permit
For New Digital Television Station
Channel 53, Galesburg, Illinois
File No. BPCDT-19951215KK
Facility ID No. 81946

Dear Counsel:

This concerns the above-referenced application of Northwest Television, Inc. (Northwest) for a new digital television station on Channel 53 at Galesburg, Illinois (File No. BPCDT-19951215KK), as amended. Quad Cities Television Acquisition Corp. (Quad Cities), licensee of KLJB-TV, Davenport, Iowa, filed a petition to deny Northwest's application.¹ For the reasons set forth below, we grant Quad Cities' petition to deny to the extent set forth herein and otherwise deny it, and grant Northwest's application.

Background. Northwest was one of four mutually exclusive applicants for a new television station on analog Channel 67 at Galesburg, Illinois. The other applicants were Donald Bae and Melissa Bae d/b/a DM Partners (DM), Highland Broadcasting, Inc. (Highland) and Galesburg 67, LLC (Galesburg 67). In 2000, the parties entered into a universal settlement that called for the applications of DM, Highland and Galesburg 67 to be dismissed for individual monetary consideration and for the application of Northwest to be granted. Subsequently, Northwest was able to change the channel assignment for Galesburg and amended its application to propose operation of a DTV-only station on Channel 53.

¹ Also before us are the following pleadings: Opposition to Petition to Deny filed by Northwest; Opposition to Petition to Deny filed by Donald Bae and Melissa Bae d/b/a DM Partners (DM); Reply To Oppositions To Petition to Deny filed by Quad Cities; Motion for Leave to Supplement Reply filed by Quad Cities; Motion to Strike Reply to Oppositions to Petition to Deny And/Or Other Appropriate Relief filed by Northwest; Opposition to Motion to Strike by Quad Cities; Reply to Opposition to Motion to Strike filed by Northwest; Motion for Leave to Further Supplement Reply filed by Quad Cities; Opposition to Motion for Leave to Further Supplement Reply filed by Northwest; and Reply to Opposition to Motion for Leave to Further Supplement Reply filed by Quad Cities.

Loan and Option Agreement. Quad Cities makes two arguments against the grant of Northwest's application.² First, Quad Cities alleges that a Loan and Option Agreement between Northwest and a third party, Second Generation of Iowa, Ltd. (Second Generation) contravenes Commission policy.³ Northwest entered into a Loan and Option Agreement with Second Generation in conjunction with the universal settlement of the Galesburg proceeding. The Loan and Option Agreement provides that Second Generation may loan Northwest \$1,475,000 for Northwest to fund the settlement payments to the other applicants. The agreement also provides Second Generation with an option to acquire the Galesburg station for \$800,000, which option may be exercised any time after the settlement agreement payments are disbursed (which would occur after approval of the settlement agreement and grant of the Galesburg construction permit). Quad Cities alleges that this agreement is prohibited by the Commission's policy that bars "white knight" settlements as expressed in its decision in *Rebecca Radio of Marco*.⁴ In that case, the Commission prohibited a non-applicant from stepping into the shoes of the surviving applicant and being awarded a construction permit. Under that policy, Quad Cities argues that Second Generation is barred from assuming Northwest's applicant status and receiving the Channel 53 construction permit.

Northwest responds that its Loan and Option Agreement with Second Generation is not barred by the Commission's prohibition against "white knight" settlements. Northwest states that it has an agreement to borrow money from Second Generation. While the loan is contemplated by the agreements, Northwest maintains it is "not required by the agreement." Northwest states that its shareholders have sufficient funds of their own to fund the settlements with the other applicants and that the Loan and Option Agreement with Second Generation was a "business decision, not a necessity."

Furthermore, Northwest argues that the option portion of its agreement with Second Generation violates no rule or policy. Northwest states that Quad Cities has overlooked other settlement decisions that the Commission has subsequently issued that "demonstrate that the circumstances presented in this case violate no rule or policy of the Commission." Northwest maintains that in these later cases the Commission permitted settlements that included options for third parties if the agreement required that the third party obtain FCC consent to acquire the licensee. Northwest cites to *Poder Broadcasting, Inc.*,⁵ in which the Review Board of the Commission permitted a settlement agreement in which a third party purchased an immediate 49% interest in the prevailing applicant with an option to apply for consent and acquire the remaining 51% one year after commencement of station operations.

² Quad Cities states that it has standing to oppose the Galesburg settlement because it is the licensee of a television station in Davenport, Iowa, and will compete with the new Galesburg station for audience and revenue. See *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

³ Quad Cities also alleges that an option agreement between Galesburg 67 and Second Generation contravenes Commission policy, but that agreement was subsequently terminated and is no longer relevant.

⁴ See *Rebecca Radio of Marco*, 5 FCC Rcd 937 (1990)(*Rebecca Radio*); and *Kimler Broadcasting, Inc.*, 15 FCC Rcd 7083 (1999).

⁵ 11 FCC Rcd 3491 (1996).

Northwest also cites to *Woods Communications Group, Inc.*,⁶ where the Commission approved a settlement in which a third party acquired an immediate 45% interest in the prevailing applicant with an option to acquire the remaining 55% interest exercisable 90 days after commencement of operations. In that case, Northwest argues, the key difference cited by the Commission from the facts in the *Rebecca Radio* case was the fact that the third party would have to apply for and obtain Commission consent before acquiring the 55% controlling interest.

Northwest also cites to *Gonzales Broadcasting, Inc.*,⁷ where the Commission approved a settlement in which a third party was granted an option to purchase the interests of all of the applicants that had merged into a single entity. Finally, Northwest cites to *Heidi Damsky*⁸ where the Commission approved a settlement that permitted a third party to hold a two-year option to acquire the station for a fixed amount of money. In that case, the Commission stated that the option did not violate the “white knight” prohibition because, in the future, if the third party were to exercise its option, it would have to obtain the consent of the Commission and that the Commission would review the qualifications of the third party and make a public interest finding before any proposed transfer of control could be consummated.

Northwest maintains that it entered into the Loan and Option Agreement with Second Generation since it was “attractive from a business standpoint because, among other things, the latter has experience in station construction and leverage for equipment purchases and delivery times.” Northwest states that it intends to lease its equipment from Second Generation on a long term basis with an option to acquire the facilities in the event that Second Generation chooses not to exercise its option. Northwest also states that it intends to enter into a Local Marketing Agreement with Second Generation that will enable Northwest to enjoy the “network connections, programming sources and operational capabilities of a group owner.”

Premature Construction. Quad Cities also alleges that, prior to a grant of its construction permit, Northwest engaged in premature construction of its new television station. Quad Cities cites to certain activities that it alleges demonstrate that construction was initiated on a new television facility for channel 53 in Galesburg. This includes locating a transmitter site for the station, mounting of an antenna on an existing tower location, installation of various transmission equipment at the tower location and mounting of a studio-transmitter microwave link on the roof of the transmitter building. Quad Cities concludes that this amounts to premature construction of the Galesburg station.⁹

Northwest responds that all of these actions were taken by Second Generation. Pursuant to its various agreements, Second Generation will construct a new television facility and then lease the facility to Northwest. Northwest states that “none of the equipment was installed so as to be ready for equipment testing or broadcasting.” Northwest maintains that the transmission line and antenna

⁶ 11 FCC Rcd 5776 (1996).

⁷ 12 FCC Rcd 12253 (1997).

⁸ 13 FCC Rcd 11688 (1998).

⁹ See *California State University, Sacramento*, 13 FCC Rcd 17960 (1998) (premature construction found where work included installation of antenna, transmitter, transmission line and related inside wiring linking such facilities).

were installed on the tower because the tower owner had a crew on site at the time doing other work and the single operation meant that Second Generation could enjoy a cost savings of approximately \$200,000.

Furthermore, Northwest argues that none of the activities undertaken by Second Generation rise to the level of premature construction. Northwest cites to various Commission decisions where certain preliminary activities were deemed to not constitute premature construction.¹⁰ These included installation of footings and anchors, delivery of equipment to the tower site, and installation of partial ground wiring, antenna, transmitter and transmission line.¹¹ Northwest argues that the key in each case was the fact that construction to the point of activation of the station did not occur. Northwest maintains that, although equipment was delivered and some wiring was undertaken, it was not done to the point that the station was operable. Northwest argues that this was consistent with Commission precedent.

Discussion. Under the Communications Act, parties submitting a petition to deny under Section 309(d) must satisfy a two-step test.¹² First, the petition to deny must set forth “specific allegations of fact sufficient to show that . . . a grant of the application would be *prima facie* inconsistent with [the public interest].”¹³ Second, the petition must present a “substantial and material question of fact.”¹⁴ If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, the Commission must formally designate the application for a hearing in accordance with Section 309(e) of the Communications Act.¹⁵

To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute “specific evidentiary facts, not ultimate conclusionary facts or mere general allegations”¹⁶ The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: “if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established.”¹⁷

If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, “on the basis of the application, the pleadings filed, or other

¹⁰ See *Wendell & Associates*, 14 FCC Rcd 1671 (1998); *Christian Broadcasting of Midlands, Inc.*, 2 FCC Rcd 6404 (1987); *IT&E Overseas, Inc.*, 4 FCC Rcd 3774 (1989); and *Patton Communications Corporation*, 81 FCC 2d 336 (1980).

¹¹ *Id.*

¹² 47 U.S.C. § 309(d).

¹³ 47 U.S.C. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987)(*Gencom*); and *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988)(*Astroline*).

¹⁴ 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; and *Astroline*, 857 F.2d at 1562.

¹⁵ 47 U.S.C. § 309(e).

¹⁶ *United States v. FCC*, 652 F.2d 72, 89 (D.C. Cir.1980) (*en banc*) (quoting *Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 323-24 (D.C. Circuit 1974)).

¹⁷ *Gencom*, 832 F.2d at 181.

matters which [the Commission] may officially notice," the petitioner has presented a "substantial and material question of fact."¹⁸ If the Commission concludes that the "totality of the evidence arouses a sufficient doubt" as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing pursuant to section 309(e).¹⁹

We find that the option portion of the Northwest and Second Generation Loan and Option Agreement is prohibited by the Commission's prohibition on "white knight" settlements. We also find that the pre-construction actions undertaken by Second Generation went beyond what is permitted without a prior grant of a construction permit. Nevertheless, we conclude that approval of the Galesburg settlement and grant of the Northwest application would serve the public interest and we otherwise deny Quad Cities' petition to deny.

Loan and Option Agreement. Upon examination of the record, we find that the option portion of the Loan and Option Agreement between Northwest and Second Generation is not permitted under the Commission's prohibition of "white knight" settlements as set forth in *Rebecca Radio* and its progeny. Although the loan portion of the agreement appears to be a *bona fide* financial arrangement and does not raise any additional issues concerning ownership or control of the new Galesburg station, the option between Northwest and Second Generation is similar to those that the Commission has found violated its prohibition on "white-knight" settlements. In a prohibited "white knight" settlement, a third party "steps into the shoes" of the surviving applicant and, upon grant of the construction permit, is immediately the permittee of the new station. This may happen while the application is still pending or immediately after it is granted. In this case, Second Generation must only await the grant of the construction permit to Northwest before it can exercise its option and acquire the permit. In the other cases where options have been permitted in the context of settlement of a proceeding for a new broadcast station, the option holder was required to wait until the new station was constructed and operating before it could exercise its option and acquire the station. That was the important distinction in the *Poder Broadcasting, Inc.*, *Woods Communications Group, Inc.*, and *Heidi Damsky*, cases.²⁰ That is not the case here. As soon as the construction permit is granted, Second Generation may immediately exercise its option. For all intents and purposes, Second Generation will be able to immediately "step into the shoes" of Northwest, an action that is prohibited by Commission policy.

Although it was part of the proposed settlement, we do not find that the option was essential to the overall settlement of this proceeding. Northwest represents that it is able to fund the settlement independent of a loan from Second Generation. The other aspects of the Galesburg settlement, that are not contested, comply with Commission policy. Therefore, we approve the settlement agreements between Northwest and the remaining applicants, and Northwest is permitted to make the settlement payments set forth therein. However, Northwest and Second Generation are not permitted to take any actions pursuant to the Loan and Option Agreement.

¹⁸ 47 U.S.C. § 309(d)(2); see also *Gencom*, 832 F.2d at 181.

¹⁹ *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985)).

²⁰ See *supra* at notes 5-8.

Premature Construction. Construction of a new broadcast station without first obtaining a construction permit is prohibited by Section 319(a) of the Communications Act.²¹ We find that Quad Cities has demonstrated that actions taken in this case constituted premature construction. Some preliminary steps are permitted prior to the grant of construction permit, however, Commission policy has always been that such steps must have no intrinsic radio communications use related to a proposed facility.²² Therefore, while actions such as site clearance, pouring of concrete footings for a tower, installation of a tower base and anchors, installation of a new power line, equipment purchases, and on-site storage of equipment²³ are permitted, other actions such as installation of an antenna, transmitter, transmission line, and related inside wiring linking these facilities together are considered to be premature construction.²⁴

In this case, the actions of installing the transmitter and mounting the antenna for the new Galesburg station stepped over the line of permitted activities and constituted premature construction. The fact that the construction was undertaken by a third party (Second Generation) does not absolve Northwest. The Commission has long held that licensees and permittees are responsible for the acts and omissions of their employees and independent contractors.²⁵ Northwest is responsible for the actions that were undertaken by Second Generation on its behalf to construct the new Galesburg station. Therefore, we admonish Northwest for premature construction that went beyond the pre-grant actions permitted under Commission precedent. Although we admonish Northwest, such action does not prevent our grant of its application for the new Galesburg station.

Conclusion. The above facts considered, and having found Northwest to be fully qualified to be a Commission licensee, we conclude that grant of the universal Galesburg settlement, minus the Loan and Option Agreement, and grant of the Northwest application, as amended, would serve the public interest.

WHEREFORE, IT IS ORDERED, That the petition to deny of Quad Cities Television Acquisition Corp. IS GRANTED to the extent set forth herein and otherwise IS DENIED.

IT IS FURTHER ORDERED, That other than the Loan and Option Agreement between Northwest Television, Inc., and Second Generation of Iowa, Ltd., the Joint Request for Approval of Settlement Agreements IS APPROVED.

IT IS FURTHER ORDERED, That the applications of Donald Bae and Melissa Bae d/b/a DM Partners (File No. BPCT-19961001XU), Highland Broadcasting, Inc. (File No. BPCDT-

²¹ 47 U.S.C. § 319(a).

²² See *IT&E Overseas, Inc.*, 4 FCC Rcd 3774, n. 8 (1989).

²³ See *Wendell & Associates*, 14 FCC Rcd 1671 (1998); *Christian Broadcasting of Midlands, Inc.*, 2 FCC Rcd 6404 (1987); *IT&E Overseas, Inc.*, 4 FCC Rcd 3774 (1989); and *Patton Communications Corporation*, 81 FCC 2d 336 (1980).

²⁴ See *California State University, Sacramento*, *supra*.

²⁵ See *Netcom Technologies, Inc.*, 16 FCC Rcd 9524, 9526 (Enf. Bur. 2001); *MTD, Inc.*, 6 FCC Rcd 34, 35 (1991); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361 (1972).

19960919KT), and Galesburg 67, LLC (File No. BPCT-19960930KS) ARE DISMISSED.

IT IS FURTHER ORDERED, That the application of Northwest Television, Inc. (File No. BPCDT-19991215KK) as amended IS GRANTED.

Sincerely,

Barbara A. Kreisman
Chief, Video Division
Media Bureau

cc: Howard J. Braun, Esq. – Counsel for Quad Cities Television Acquisition Corp.
John Borsari, Esq. – Counsel for DM Partners
James Oyster, Esq. – Counsel for Galesburg 67, LLC
Howard Weiss, Esq. – Counsel for Highland Broadcasting, Inc.